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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1940

No. 403

GUY A. THOMPSON, TRUSTEE for the MISSOURI PACIFIC RAILROAD COMPANY, Debtor,
Petitioner,

vs.

NEAL WILEY, Respondent.

PETITION FOR REHEARING

THOS. T. RAILEY,
W. L. CURTIS,
THOMAS B. PRYOR,
Attorneys for Petitioner.

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The petitioner in the above cause respectfully presents his petition for rehearing and desires to call this Court's attention to decisions of the Supreme Court of Arkansas involving matters of procedure, which may have been considered by this Court in denying the petition for certiorari.

The order entered denying the petition for certiorari states:

> "On consideration of the suggestion of a diminution of the record and motion for a writ of certiorari in that relation, the motion for a writ of certiorari is granted. The petition for writ of certiorari to the Supreme Court of the State of Arkansas is denied."

Respondent in his "Brief and Argument of Respondent in Opposition to Petition for Writ of Certiorari" (page 6) states:

> "As stated, the original complaint was filed on December 5, 1938. Petitioner filed answer to the original complaint on March 2, 1939, in which the defense of assumption of risk was plead (R. 5). It is further disclosed that on March 3, 1939, such amendment was filed (R. 6). On March 13, 1939, ten days after the filing of this amendment, petitioner filed 'Answer to Amended Complaint' (R. 7). All that was stated in this answer is, 'That he denies each and every material allegation in said amended complaint set out and contained.' There is not the slightest reference to assumption of risk, which is an affirmative defense and, under the law of procedure both in the State of Arkansas and in the Federal courts, must be affirmatively plead, as we shall show."

and on page 12 under the heading "The Contention That the Supreme Court of Arkansas Erred in Ignoring the Defense of Assumed Risk" respondent stated:

> "Under this head it is stated: 'The petitioner herein, defendant in the trial court, specifically pleaded as a defense assumed risk. He asked for instructions on the doctrine of assumed risk.' As we have previously shown, as to the amended complaint which he contends contained the only allegation of negligence upon which the cause was submitted to the jury, he did not in any way plead as a defense assumption of risk (R. 7). Under the rules and law

of procedure of the State of Arkansas, such defense is an affirmative one and must be specifically plead."

The record on page 6 shows that there was not an "Amended Complaint" filed, but there was filed March 3, 1939, "Amendment to Complaint." It is true that on page 6 of the record it appears that defendant filed "Answer to Amended Complaint" when it should have been styled "Answer to Amendment to Complaint", and the defense of assumed risk having been specifically pleaded in the original answer (R. 5) there was no necessity for again pleading it in the "Answer to Amendment to Complaint."

We do not know to what extent, if any, this suggested technicality became involved in the Court's consideration of the petition for certiorari, and therefore we desire to call this Court's attention to the fact as shown by the record that the issue of assumed risk was not only submitted to the jury but that the plaintiff (respondent) in his instruction No. 5 requested the court to instruct the jury on that issue and the court gave said instruction:

Instruction No. 5

"You are instructed that the plaintiff by engaging in the service of the defendant assumed the risk of injury from the ordinary and usual risks and hazards that are incident to the business in which he was engaged, and assumed the extraordinary risks, if any, of his employment of which he had knowledge and appreciated the danger of which were so obvious that an ordinarily prudent person would have known and appreciated the danger, but he did not assume (fol. 301) the risk of any negligence upon the part of the defendant unless he knew of such negligence, if any, and appreciated the danger to

himself therefrom and thereafter continued in his employment, or unless such negligence, if any, was so open and patent that a person of ordinary intelligence and observation must have known of such negligence, if any, and appreciated the danger therefrom (R. 168).

and the defendant (petitioner) also requested an instruction on that issue which was given by the court (R. 174) as follows:

Instruction No. 2

"You are instructed that under the pleadings and proof in this case the plaintiff at the time of his alleged injury was engaged in interstate commerce, as provided in the Federal Employer's Liability Act. And in this connection I instruct you that if you find from the testimony that the plaintiff's alleged injury resulted from the hazards incident to his employment, that then and in that event he assumed such hazards and risks, and therefore cannot recover in this action."

Therefore, this situation is presented. The plaintiff (respondent) insisted in his "Brief and Argument of Respondent in Opposition to Petition for Writ of Certiorari" that the question of assumed risk was not pleaded by defendant (petitioner) in its "Answer to Amendment to Complaint" and therefore was not an issue in the case. However, having asked an instruction submitting that issue the respondent (plaintiff) is estopped under the decisions of the Supreme Court of Arkansas from asserting that the issue of "assumed risk" was not in the case.

The Supreme Court of Arkansas in the case of Evins v. St. Louis & S. F. R. Co., 147 S. W. 452, 104 Ark. 79, held:

> "One may not complain of an erroneous instruction if he has asked an instruction containing the same error."

In National Fruit Products Co. v. Garrett, 181 S. W. 926, 121 Ark. 570, the Court held:

> "The error of the trial court in instructing the jury on an issue not raised by the evidence is harmless where both sides requested an instruction on that issue."

In Western Union Telegraph Company v. Arant, 115 S. W. 136, 88 Ark. 499, the Court said:

> "Appellant cannot complain of an error of the trial court which it invited by its own instruction."

In St. Louis Southwestern Ry. Co. v. Grayson & Seitz 115 S. W. 933, 89 Ark. 154, the Court held:

> "Appellant cannot complain of an erroneous instruction which was given at his request."

In Patterson v. Risher, 221 S. W. 468, 143 Ark. 376, the Court held:

> "Where plaintiff administrator of a deceased employee asked that the issues of contributory negligence and assumption of risk be submitted to the jury, which prayers were granted, on his appeal he cannot complain of any error in such submission, having invited it."

Numerous other cases of the Arkansas Supreme Court might be cited in support of the rule that where the plaintiff assumes an issue to be involved in a case he cannot on appeal assume an inconsistent position.

The petitioner herein interposed the defense of assumed risk and the issue was submitted to the jury in the trial court and was submitted to the Supreme Court

of Arkansas, but was entirely ignored by that court. There was not a suggestion, however, in that court that assumed risk as a defense was not properly pleaded because it was not included in the answer to the amendment to the complaint, but neither in the opinion rendered by the majority of the court nor the minority opinion rendered by Chief Justice Griffin Smith was any reference made to assumed risk as a defense, and we are unable to determine from the record as to whether or not it was considered by this Court. The dissenting opinion of Chief Justice Griffin Smith is based upon the lack of "substantial evidence" to support the judgment.

It is the well settled rule in Arkansas that pleadings will be treated as amended to conform to the proof in such a case as involved here.

In the case of Arkansas Bankers Association v. Ligon, 295 S. W. 4, 174 Ark. 234, 53 A. L. R. 534, it was held that where an issue not specifically raised in the pleadings was raised by plaintiff's undisputed testimony the court should have treated the pleadings as amended to correspond with the evidence. There are numerous other Arkansas decisions to the same effect.

St. Louis A. & T. Ry. Co. v. Triplett, 16 S. W. 266, 54 Ark. 289, 11 L. R. A. 773.

McElvaney v. Smith, 88 S. W. 981, 76 Ark. 68, 6 Ann. Cas. 458.

K. C. S. Ry. Co. v. Rogers, 225 S. W. 640, 146 Ark. 232.

The question of whether or not the defense of assumed risk was properly pleaded was raised in this Court for the first time. The attorneys for the plaintiff (respondent here) treated it as an issue. The petitioner here treated it as an issue. The trial court treated it as an issue, and at the request of both sides submitted an instruction concerning the defense of assumed risk. That there was ample testimony on this point is evidenced by the statement in the majority opinion of the Supreme

Court of Arkansas, where it is stated that it is common for coal to fall from trains and while the opinion of the Supreme Court of Arkansas does not mention assumed risk, yet in view of this statement that such an occurrence is common knowledge, certainly the plaintiff assumed the risk of standing in the position claimed by him.

We respectfully submit that this petition for rehearing should be granted and that the petition for certiorari should be granted and the cause reversed.

Respectfully submitted,

THOS. T. RAILEY,
W. L. CURTIS,
THOMAS B. PRYOR,
Attorneys for Petitioner.

CERTIFICATE

I, Thomas B. Pryor, member of the bar of this Court, do hereby certify that I have prepared the above and foregoing petition for rehearing and that this petition is presented for the purpose of calling this Court's attention to the decisions of the Supreme Court of Arkansas with reference to the alleged omission to plead assumed risk in this case and not for the purpose of delay.

THOMAS B. PRYOR,
Counsel for Petitioner.